Cases and Materials on Remedies

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REMEDIES

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Introduction

This course explores the middle ground between procedure, on the one hand, and substantive law, on the other. If we take procedure to refer to society's mechanisms for the resolution of disputes, ultimately the mechanics of litigation; and substantive law to be the definition of rights between individuals in their relations with each other and the state, then remedial law refers to the techniques available for the translation of substantive rights into concrete or practical terms.

The importance of this somewhat neglected area is obvious. Of what use are substantive rights if they are not or cannot be effectively implemented? How "fair" will the best possible procedural scheme appear to be if the litigant is left without effective redress at the end of the day?

Despite its importance, the law of remedies has received relatively little attention from academics. Moreover, as we shall see through the cases, it is not an area which has produced refined or systematic judicial thought.

One of the themes of the course is that remedial choices are more significant than the present literature would suggest, and more susceptible to analysis than is indicated by the case law. Not only are the choices significant, and thus deserving of thoughtful elaboration, but they are often agonizingly difficult. A great deal of judicial soul-searching is often hidden behind the concluding paragraph of the judgment which tells the plaintiff what it is he will actually get.

This state of relative unrefinement is both the curse and blessing of remedial law. It is a curse because litigants and judges are often unfairly at sea with respect to a very important aspect of the case. The converse is the blessing. The very want of definition in remedial law and the emphasis on judicial discretion allows the courts on occasion to make dramatic and significant shifts in the remedial area which often extend to have an impact on substantive rights.

Indeed, another theme which runs through the course is the use of remedial choice to repair substantive defects. Perhaps because remedial law is relatively less developed, the judges often find it easier to justify a desired result, difficult to justify on "black-letter" principles, by moulding novel remedial solutions than by departing from accepted substantive law doctrine. In this sense, remedial law takes on added (although perhaps illegirimate) significance.

Another recurrent theme is that of the impact of history. We will be focussing on the specific remedies of equity in this course. Are the historic principles governing equitable relief, the product of a now forgotten struggle between two courts vying for control within a single state, still to govern us. Maitland told us in the context of the common law that although dead, the forms of action still rule us from their graves. We shall see that to some extent, equity has its own ghosts of the past. We must ask, then, whether constraints historically imposed upon remedial choices remain valid today. We shall see that to some extent there is a revival of the true (pre-nineteenth century) spirit of equity in the case law, and that very often in the remedial context, the courts are more and more prepared to make significant and exciting strides.

Remedial choices may be roughly classified as being constitutive, substitutionary, or specific.

A constitutive remedy is one which itself declares a certain state of affairs or status. It requires no further implementation: the very fact of the judgment itself produces the desired remedy. The most obvious example is perhaps a divorce decree: the statement from the court that the parties are divorced is all that is needed, even at the practical level, to implement their change in status. As we shall see, except in specific areas, such as divorce, the constitutive or declaratory approach is not one with which the courts are at ease. The instinct produced by the common law tradition is to shrink from general statements or declarations of rights, and to opt for a more specific, concrete, and ad hoc response.

The presumptive remedy in our tradition is substitutionary: damages. We aim to put the injuried or wronged party in the position he would have been insofar as money will allow. Time constrains us to spend little, if any, time on the basic issues in the law of damages. These matters tend to be fully explored in first year courses in Contracts and Torts. However, since damages is the presumptive remedy, we will constantly have to deal with the underlying policies and purposes of the law of damages although our focus will be on specific remedies. In this sense, our study of damages will tend to be in reverse; we will not be asking what is the appropriate measure of damages, but rather, whether is it possible and appropriate to translate in money terms, the substantive right the plaintiff legitimately asserts.

It is where damages fail to achieve this goal that specific relief is available. A specific remedy is one what gives the plaintiff the very thing he bargained for, restores property or rights to the state existing before the defendant's wrongful invasion, or protects the plaintiff's position from threatened harm. We will focus on the issues of specific relief for most of this course.